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AUTHOR Anapol, Malthon M.
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ABSTRACT

Unlike most of the regulatory constraints which have impact on the media, libel, slander, and invasion of privacy are common law concepts developed from the precedents of previous court decisions and from reasoning employed in the written judicial opinions of appellate courts. Since common law is thus both traditional in nature and subject to rapid changes, the courts' handling of these concepts in relation to the media is complex, as may be seen in several specific court cases. Basically, the American system protects individuals who might be seriously damaged by irresponsible abuse of the first amendment freedoms (free speech and free press). That is, you can say it, print it, or broadcast it, but you must be prepared to face the consequences of your actions. No society has developed a better system in terms of freedom with responsibility for the media and protection for the individual. (JM)

# THE COMMON LAW THREESOME: LIBEL, SLANDER, AND INVASION OF PRIVACY

Malthon M. Anapol

University of Delaware



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## THE COMMON LAW THREESOME: LIBEL, SLANDER, AND INVASION OF PRIVACY

Unlike most of the other regulatory constraints which have impact on the media, the three discussed in this essay, libel, slander, and invasion of privacy are common law concepts. Essentially, common law is judge made law in that it develops from the precedents of previous court decisions and from reasoning employed in the written judicial opinions of appellate courts. There are state statutes which define and detail some of the concepts we are examining, but even those statutes must be interpreted by courts and judges. Federal regulatory agencies such as the Federal Communications Commission and the Federal Trade Commission have virtually no role or influence in common law areas.

The result is that common law is both traditional in nature and subject to rapid changes. This seeming paradox exists because no change will usually take place without a court decision, but a new and sweeping precedent can bring about sudden change with little or no warning. Therefore, in this paper I will try to define each of the three legal concepts in traditional terms and then discuss some of the most recent trends and developments.

Almost at once we encounter a problem stemming from the traditional nature of common law; that is the distinction between libel and slander. Libel and slander are both forms of defamation and defamation is defined by Prosser[1] as "an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which (an individual) is held." By common law tradition libel was that defamation which was written and slander was that which was spoken. However, twentieth century courts have tended to classify on the basis of permanent record or form and, as a result most broadcast defamation has become libel. Some courts have based the distinction

on whether the defamation was read from a script or "ad libbed." In those cases scripted material has been held to be libel and non-scripted material has been defined as slander.

The distinction between libel and slander can be an important one since the ability of the plaintiff, the person bringing the charges, to recover cash damages will in part at least be a function of this distinction. As Toohey, Marks, and Lutzker[2] point out, "In most cases of slander a plaintiff is also required to establish that he has actually been damaged by the statements, and to prove the amount of the loss." It can be inferred that libel was considered as more damaging since it was more permanent and since it reached more people, but a libelous letter sent to one person would have the same legal status as an article in The New York Times.

Once we get beyond the distinction between libel and slander, we can consider defamation as a unified concept and we will do so except where there are important differences. This unified concept we will refer to as defamation. The first step in establishing defamation is to determine that the defamatory statements have been published or circulated. Courts have held that a sealed letter sent to the subject of the defamation is not publication since no one but the party attacked will see it, but statements on a post card which are exposed to others was considered to be publication. In one slander case "publication" was not achieved because the defamatory statements were made in a foreign language which only those directly involved were able to understand. In general publication takes place when a third party did or could have received the defamatory statements; the size of the audience does not determine whether or not publication of the defamation has taken place.

The defamed person must be identified or his identity "reasonably inferred" from the disputed message. This could involve a well known nickname, for example "old blue eyes" would be a reasonable inference for Frank Sinatra,

or it might involve identifying a person by an office or a position such as a mayor or a dean. Another aspect of this problem is group libel, as when defamation is directed at a number of individuals. The largest group to win such a case in the United States was a major college football team of sixty players who won a libel action against a local newspaper which had charged them with excessive drinking and abuse of drugs. The general test is whether or not it is reasonably possible to pinpoint the person or persons involved, presumably any interested person could have obtained a football program and scanned a list of names of players with accompanying photographs.

To state precisely just what kind of remark is defamatory is a more complex question than it would appear to be at first glance, but a few general guidelines do exist. There are a class of remarks which the common law has considered to be actionable per se; thus even slander in this category would merit the assurance of some award of damages. There are four common law categories which constitute defamation per se: a false statement that a person has a loathsome communicable disease; a false statement that a person has committed a serious crime; a false statement that a person is not competent to practice his trade or profession; and a false statement impugning the chastity of a female. As may be observed from the preceding, truth is a defense in almost all cases of defamation, but not all untrue statements are defamatory.

The four bases of defamtion per se are a bit general and they do require some additional explication. Courts have held leprosy to be an example of a loathsome communicable disease, and it seems reasonable to include the venereal diseases in that category, but after that the definition becomes a matter of interpretation. The heading of a serious crime can be seen to include all felonies such as robbery, assault, and murder, but the status of drunken driving is unclear. Presidential candidate Barry Goldwater sued a magazine editor

successfully for labeling him as a borderline psychotic who was unsuited to the demands of the high office he was seeking, but the meaning of "not competent to practice a trade or profession" could vary with the nature of the position. Courts have held that the unproven assertion that a person drinks to excess was not defamatory per se, but suppose this charge was leveled at a commercial air line pilot. The outcome in such a case might be the reverse of the past precedent.

Why the chastity of a female should be treated differently than that of a male is a question which will not be treated here, although it might well be a legitimate problem for those legal scholars concerned with the doctrine of equal protection under the law. On the other hand when singer Frank Sinatra publicly called a female Washington Post reporter a "two dollar broad" he not only apologized to the offended lady, but also made an out-of-court settlement to avoid a slander suit which he was sure to lose.

We have thus far considered the three basic elements of defamation: publication of the defamation, identification of the defamed party, and the general nature of defamatory messages. We turn now to some of the more recent complications and the effects of those decisions on the media. The notion of malice in the law of defamation is not a new concept but it is a rapidly evolving one. Toohey, Marks, and Lutzker[3] define actual malice as a statement made "with knowledge that it was false or in reckless disregard of its falsity." This definition would imply that a journalist or a broadcaster could not then be guilty of libel when an honest mistake has been made. In general courts have taken that position but they have considered such elements as the expertness of the reporter, the time remaining until the news deadline, the effort made to verify the story, and the position of the person who was the subject of the alleged defamation.

In a landmark case (New York Times v. Sullivan, 376 U.S. 355, 1964), the

Supreme Court concluded that the first amendment protection of freedom of speech requires that a showing of "actual malice" be made before recovery for defamation can be had by a public official for criticism of his conduct of his official duties. The effect of this decision has been to put upon the plaintiff the burden of proof to demonstrate that "actual malice" has occurred. Traditionally the plaintiff had only to show that he was identified, that the defamation had been published by the defendant, and that the remarks were damaging. The defendant had the burden of proof to show that the remarks were true or in some way privileged (a concept which will be dealt with later in this essay.) However, this decision meant the plaintiff had a new and difficult task, that of showing that the maker of the remarks knew that the remarks were false, and that he had acted in reckless disregard of that information. While this decision may seem to declare open season on public officials, the feeling of the court has been that the use of the "actual malice" standard was necessary in order to provide the media with the freedom to write and comment on matters of public interest. The coverage of the Watergate case provides an example of the implications of the Sullivan decision.

In the decade since the Supreme Court handed down the New York Times v. Sullivan decision the scope has been extended in many ways. The definition of "public official" was broadened to include those appointed as well as those elected and at this point might even be construed to include the wheelmanship of a driver of a municipal trash collection truck. Next the court extended the concept of fair comment to include "public figures" as well as public officials. Public figures have been extended to include anyone who thrusts his personality into the vortex of important public controversy. However, the controversy must be of reasonably recent vintage, since one winner of a libel action was able to prevail because the controversy was more than ten years in the past. There are two recent cases in this area, Rosenbloom

and Gertz which seem important enough to merit special attention.

The facts in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) seem sufficiently complex to require the summary which follows:

> In 1963, Rosenbloom was a distributor of nudist magazines in the Philadelphia metropolitan area. During that year, the Philadelphia Police Department began a special enforcement program under the City's obscenity laws in response to citizen complaints.
>
> Police cracked down on newsstands all across town and on one eventful day arrested Rosenbloom as he was delivering some of his magazines to a newsboy. A few days later, the police obtained a warrant to search Rosenbloom's home and seized his inventory of magazines and books. Rosenbloom, who was arrested after his initial encounter with the police and then released on bail, was arrested once again.
>
> After the second arrest, a police captain telephoned local radio stations and news services to report the arrest of Rosenbloom. One station carried the story every half-hour on its news report, describing Rosenbloom as a peddlar of "allegedly obscene books" and as the "main distributor of obscene material in Philadelphia."
>
> Two weeks later, Rosenbloom filed suit against the City and police officials and several local news media. Radio stations reported the suit without mentioning Rosenbloom by name, describing it as the way in which "girlie book peddlars" opposed police crackdowns on obscene literature. The criminal obscenity trial resulted in an acquittal for Rosenbloom; however, that result only fanned the fire of his desire to have his name cleared of the defamatory remarks made by the radio station.
>
> At the trial the station's news director testified that his staff prepared the first story based on the tip from the police captain and, although he couldn't recall the source of the second story, generally they relied on wire service copy and oral reports from previously reliable sources. A local jury returned a verdict in favor of Rosenbloom and awarded damages totalling $750,000. The trial judge reduced this sum to $250,000, but on appeal the verdict was completely reversed. The Supreme Court affirmed that reversal.

Hence in the end Rosenbloom lost the case.

There are several significant aspects to this case. The Sullivan doctrine was extended to a private individual who had not voluntarily thrust himself into any controversy; the controversy had sought him. The court held

that Rosenbloom could recover damages only if he could prove "actual malice" on the part of station WIP and Metromedia and the "hot news deadline" of a radio station was taken into consideration. The court recognized the first amendment "commitment to robust debate on public issues" and then made the subject matter of the alleged defamatory statements rather than the person involved the basis of the decision.

The case of Elmer Gertz v. Robert Welch, Inc. decided by the Supreme Court in 1974 also merits our special attention. In 1968 Chicago police officer Richard Nuccio was convicted of second degree murder in the slaying of a juvenile. The victim's family engaged an attorney, Elmer Gertz, to represent them in a civil action for wrongful death against the convicted police officer. The John Birch Society's monthly magazine, American Opinion, then assigned a regular contributor to write an article on the case which appeared in the March 1969 issue which falsely accused Gertz of having a criminal record, of being a Communist-fronter, and of framing the Chicago police officer. A U. S. District Court judge ruled that the article on Gertz was libelous per se and the jury awarded Gertz $50,000. But the judge, prior to the Rosenbloom case, reversed himself and decided that Gertz would have to show "actual malice." The Seventh Circuit Court of Appeals sustained the trial judge and Gertz appealed to the Supreme Court.

The high court found for Elmer Gertz concluding that a newspaper or a broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim a constitutional privilege against liability for the injury inflicted by such statements. The court added that there was no constitutional value in false statements of fact. The writer would add that an examination of the facts in the two cases indicates that there were significant differences in the situations.

The area we need to consider next is privilege. Privilege provides immunity from responsibility and from legal action for defamation; there are absolute and qualified privileges. Toohey, Marks and Lutzker[4] suggest six bases for absolute privilege.

1. Judicial Proceedings: this would include statements by judges, jurors, attorneys, witnesses, or anyone else involved in legal proceedings, providing the statements are part of the official trial record.

2. Legislative Proceedings: this is the familiar congressional immunity and includes legislators as well as witnesses testifying before a committee. It also extends to media reporting without comment the exact content of the speech.

3. Executive Communications: these are covered as long as they are within the scope of official duty of a national, state, or local government executive.

4. Publications made with the Consent of the Plaintiff: if you bring about the publication of defamatory remarks you cannot then sue for defamation.

5. Communication between Husband and Wife: due to the nature of the marriage relationship a third party cannot sue over a statement made about that third party by one spouse to another.

6. Political Broadcasts: when stations are required to grant a political candidate equal time for a reply under section 315 of the Communications Act, and thus the broadcaster may not censor the reply, the broadcaster is granted immunity from a defamation suit. This is based upon the well known case of The Farmers Educational and Cooperative Union of America v. WDAY, 360 U. S. 525, (1959).

In addition to absolute privilege, there is qualified privilege. In essence qualified privilege can result in immunity from a defamation suit if

certain conditions are met. This is an exceedingly complex area which is not easy to present in skeleton form, but one qualified privilege is the privilege to reply to the attacks of another person. The replier would have qualified privilege to answer, but not to go beyond the scope of the original attack and utter new defamatory material. Qualified privilege includes the reporting of arrests and indictments, statements made in a business relationship, and a person who is required to speak for another party, but it does not usually extend to a purely social relationship. Theater critics have qualified privilege so long as they discuss the merits of the production. No one can fully explore defamation in a few pages and this discussion is intended only as an introduction to an involved problem for the media. But in general it can be said that if a reporter is truthful, careful, fair, and accurate, defamation will be difficult to sustain. Frequently reporters take the wise precaution of interviewing the party potentially defamed in a story and extend to that individual the opportunity to give his side of the story. Such an action is in itself a strong counter-argument to the charge of malice or misuse of a qualified privilege.

## Invasion of Privacy

Invasion of privacy is one of a very few common law concepts which are of twentieth century origin. Louis Brandeis discussed the idea in a Harvard Law Review[5] article at the turn of the century but the first case did not come down from the courts until 1902[6]. It seems clear that the notion of invasion of privacy had to await the development of the mass media of communication and that most such attacks on privacy come through the mass media. The right of privacy is simply the right to be left alone. There are essentially five ways in which the privacy of a person can be invaded:

1. The expropriation of a name or a picture for commercial purposes without written consent. The early cases involve using a photograph in an adver-

tisement, but in the Marion Kerby case her name was used in a film and a publicity letter for that film.

2. An intrusion upon one's solitude or seclusion, physically or by a wiretap or a hidden camera. This is the basis of the case of Galella v. Onassis, 353 F. Supp. 196 (1972), in which a free-lance photographer followed Jacqueline Kennedy Onassis around to take embarrassing pictures of her.

Public disclosure of embarrassing private facts not necessarily defamatory. Barber v. Time, Inc. 348 Mo. 1199, (1942) involved a hospitalized woman who had been photographed without her consent and written about as "the starving glutton" by Time magazine.

4. Placing a person in a false light through fictionalization or misuse of names and pictures in otherwise legitimate news stories. For example, an honest cab driver won an award when his picture was used to illustrate a story about crooked cabbies (Peay v. Curtis Pub. Co. 78 F. Supp. 305 (1948) ).

5. Public release of private information is also an invasion of privacy unless there are good reasons to justify such actions.

When we examine the justification for invasion of privacy we find that newsworthiness is the most common defense offered. The basic issue is whether the information is such that the public has a right to know, and we might add a need to know. A related question is when does newsworthiness end? In the case of Mau V. Phillips Lord Productions fifteen years was long enough to end newsworthiness, yet in Sidis v. F-R Pub. Corp., 113 F. 2d 313 (5th Cir. 1971) newsworthiness was a successful defense after 23 years. For the present, at least, general statements are difficult to make and each broadcaster must make fair and reasonable judgments about what is newsworthy and what is not. One criterion which may be helpful is the ability of the person who is the subject of the news story to command a forum for a reply. Thus a prominent public figure who can be assured of media reply space is much less

likely to sustain an invasion of privacy action than a totally obscure workingman. The rationale is that when a person agrees to go into public life or agrees to accept fame as an athlete or actor, that person should accept a diminution of his or her privacy. There are limits on this notion in regard to the subject matter involved and the circumstances. Ralph Nader was, as the author of Unsafe at Any Speed, well-known and a public figure when General Motors engaged a detective agency to look into Mr. Nader's personal life and professional activities. In spite of his public figure status Nader was able to negotiate an out of court settlement of over $600,000 in response to his invasion of privacy action against General Motors.

Another common defense in invasion of privacy actions is consent, that is a claim is made that the plaintiff agreed to the use of his likeness or picture. This is a reasonable and valid defense, but most states require that the defendant have written consent to make an acceptable defense. It should also be pointed out that according to Toohey, Marks and Lutzker[7] there are four states that have not recognized the right of a plaintiff to recover for an invasion of privacy. They are Rhode Island, Nebraska, Texas, and Wisconsin. On the other hand a broadcaster could be sued in a nearby state for a broadcast originating in one of the states not accepting the concept, providing the broadcast could be received in the neighboring state. In the case of Rhode Island at least, that would not be too difficult a problem.

If the reader feels that somehow defamation and invasion of privacy are related, a correct conclusion has been drawn. Defamation concerns public exposure of falsehoods and resulting damage to the reputation of the person defamed. Invasion of privacy involves the harm to the individual of mental distress as a result of a private matter having been exposed to public view. In an invasion of privacy litigation there is no concern over the harmfulness of the material put in the public view. It is even conceivable that one might

wish to keep praise private, but a defamation charge must be such as to be harmful to the reputation of the injured party.

Americans are justly proud of the first amendment concepts of free speech and free press. We should also be proud of our system of protection for individuals who might be seriously damaged by irresponsible abuse of those first amendment freedoms. Basically our system is that you can say it, print it, or broadcast it, but you must be prepared to face the consequences of your actions. The defamed person can go to the courts for relief in the form of vindication and money damages. Such a system is complex at best, and often costly and difficult for those enmeshed in it, but no society has ever developed a better system in terms of freedom with responsibility for the media, and protection for the individual.

## Footnotes

Malthon M. Anapol (Ph. D. Ohio State University) is Associate Professor of Speech Communication at the University of Delaware. This article is based on a paper read at the Speech Communication Association Convention, Houston, Texas, December, 1975.

1 William L. Prosser, Handbook of the Law of Torts, St. Paul: West Publishing Co., 1971, ( fourth edition).

2 Daniel W. Toohey, Richard D. Marks, and Arnold P. Lutzker, Legal Problems in Braodcasting, Lincoln: Great Plains National Instructional Library, 1974.

3 Ibid.

4 Ibid.

5 Louis Brandeis, "The Right to Privacy," 4 Harvard Law Review 193 (1890).

6 Roberson v. Rochester Folding Box Company, 171 New York 538 (1902).

7 Daniel W. Toohey, Richard D. Marks, and Arnold P. Lutzker, op. cit.